CHEONG CHENG ONN A

v.

K & N KENANGA BHD

HIGH COURT MALAYA, KUALA LUMPUR B
HISHAMUDIN MOHD YUNUS J
[CIVIL SUIT NO: D1-22-1847-2000]
1 MARCH 2010

CONTRACT: *Breach - Shares - Sale of shares - Contra losses - Sale of shares held in plaintiff's Central Depository System account to recover contra losses - Whether shares held as collateral - Whether sale of shares lawful - Burden on plaintiff to show that shares not held as collateral - Plaintiff estopped from denying that shares were held as collateral* C

CONTRACT: *Sale of shares - Contra losses - Sale of shares held in plaintiff's Central Depository System account to recover contra losses - Whether shares held as collateral - Whether sale of shares lawful - Burden on plaintiff to show that shares not held as collateral - Plaintiff estopped from denying that shares were held as collateral* D

EVIDENCE: *Burden of proof - Onus on party asserting a fact to adduce evidence of such fact - Allegation by plaintiff that shares not held by defendant as collateral - Burden of proof on plaintiff - Evidence Act 1950 s. 103* E

EVIDENCE: *Relevancy - Relevancy of facts - Admissions - Admission by agent - Admissions made by plaintiff's solicitors in letter to defendant - Whether admission by agent relevant and admissible under Evidence Act 1950 s. 21 - Whether admissions by agent operate as estoppel by virtue of Evidence Act 1950 ss. 31 & 115* F

EVIDENCE: *Relevancy - Relevancy of facts - Admissions - Estoppel - Plaintiff estopped from denying admissions made in letters to defendant - Admissions admissible under Evidence Act 1950 s. 21 - Admissions operating as estoppel by virtue of Evidence Act 1950 ss. 31 & 115* G

SECURITIES: *Shares - Share trading - Contra losses - Sale of shares held in plaintiff's Central Depository System account to recover contra losses - Whether shares held as collateral - Whether sale of shares lawful - Burden on plaintiff to show that shares not held as collateral - Plaintiff estopped from denying that shares were held as collateral* H

The defendant was a stockbroking company and was a member of the Kuala Lumpur Stock Exchange ("KLSE"). On 21 February 1997 the plaintiff opened an individual share trading account with I

the defendant for the purpose of trading in shares at the KLSE. In order to open the account, the plaintiff completed and submitted to the defendant an application form ('the application form'). Paragraph 9 of the terms and conditions in the application form provided that the defendant was authorised to sell at its absolute discretion all stocks and/or shares held by defendant under collateral and as well as in CDS account to settle the plaintiff's outstanding debit balances with the defendant. The plaintiff subsequently instructed the defendant to purchase 33,000 units of shares of a company known as Pancaran Ikrab Bhd ('PIB shares'). The plaintiff made full payment for the shares and the shares were deposited in the plaintiff's Central Depository System ("CDS") account with the defendant. In August 1998 all the PIB shares were sold in stages by the defendant as settlement of the plaintiff's debt with the defendant incurred by the plaintiff as a result of the accumulation of his contra losses and unpaid interests. The plaintiff then commenced this action claiming that the PIB shares were not collateral and as such the defendant had no right to forced sell them. The plaintiff therefore claimed damages for the wrongful sale of the shares on the grounds that the defendant had committed the tort of conversion. The defendant contended that para. 9 of the terms and conditions gave them the right to sell the PIB shares as the shares had been pledged by the plaintiff to the defendant as collateral.

Held (dismissing the plaintiff's claim with costs):

(1) Based on s. 103 of the Evidence Act, 1950 ("EA50"), in light of the relationship of the parties, and in the light of the plaintiff's claim, the legal burden was on the plaintiff to prove that the PIB shares were not held by the defendant as collateral. It was the plaintiff who wished the court to believe in the existence of a particular fact - that particular fact being that the PIB shares were not held by the defendant as collateral. (para 24)

(2) The plaintiff failed to prove on a balance of probabilities that the shares were not held by the defendant as collateral. The plaintiff signed the application form containing the terms and conditions, including para. 9 which deemed shares held in the CDS account to be collaterals. The PIB shares were held in the CDS account. The application form was a contract between the plaintiff and the defendant. The plaintiff also failed to explain clearly and adequately as to why the PIB shares were held by the defendant in his CDS account despite the fact that the

shares had been fully paid. Further, the exchanges of letters between both parties clearly showed that both parties regarded the PIB shares as being collateral. (paras 27, 28, 29, 30, 31, 32, 33, 34 & 35)

(3) The plaintiff was estopped from denying the admissions that he had made in his various letters to the defendant - the admissions that the PIB shares were collateral. The plaintiff's admissions were admissible by reason of s. 21 of EA50. Although the admissions were not conclusive proof of the matter admitted, nevertheless, they operated as an estoppel by virtue of ss. 31 and 115 of EA50. (paras 38, 39 & 40)

(4) There was also the evidence of the plaintiff's own solicitors in a letter to the defendant where again it was admitted that the PIB shares were held by the defendant as collateral. This was an admission by an agent. The admission by the agent was as good as an admission by the plaintiff himself, the principal. The admission by the plaintiff's solicitors was relevant and admissible by reason of s. 21 of EA50 and, likewise, the principle of estoppel applied by reason of ss. 31 and 115 of EA50. (paras 46, 47, 48 & 49)

(5) Even if the legal burden was on the defendant to prove that the PIB shares were collateral, based on the evidence, the defendant had succeeded in proving on a balance of probabilities that the PIB shares were collateral. It was clear from para. 9 of the terms and conditions of the application form, in particular, the words ' ... under collateral as well as in CDS account ...' that CDS shares were collaterals. (para 59)

Case(s) referred to:
Pickard v. Sears [1837] 6 A, & E 469 ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 18, 21, 31, 103, 115

Other source(s) referred to:
Clerk & Lindsell on Torts, 17th edn, pp 634, 640, 650, 651, para 13-20
Phipson on Evidence, 17th edn, pp 112, 118
Sarkar's Law of Evidence, 15th edn, vol 1, p 917

For the plaintiff - M Moghan; M/s Moghan & Co
For the defendant - B Inderjit Singh; M/s B Inderjit Singh

Reported by Amutha Suppayah

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JUDGMENT

Hishamudin Mohd Yunus J:

[1] This is an action in tort - the tort of conversion; the alleged conversion of shares belonging to the plaintiff by the defendant. The alleged tort is said to have been committed by the defendant when the defendant, by reason of the plaintiff's failure to settle his debt, sold the plaintiff's shares to a third party.

[2] At the conclusion of the trial, I dismissed the plaintiff's claim with costs.

[3] I shall now give my reasons.

[4] I shall first begin with the law pertaining to the tort of conversion. Clerk & Lindsell on *Torts*, 17th edn (at p. 640, para 13-20) defines the tort of conversion as follows:

> A person who without authority delivers another's goods to a third party by way of sale or gift, or otherwise in a manner adverse to the right of the person really entitled, is guilty of a conversion (*Martindale v. Smith* [1841] 1 QB 389).

[5] The learned authors then go on to state what 'goods' are capable of being converted (at p. 650, entry 13-42):

> At common law conversion lies in respect of dealings with any corporeal personal property (ie, not choses in action or intellectual property rights), including papers and title-deeds, other than money regarded as currency.

[6] The learned authors further state (at p. 651, entry 13-45):

> Negotiable instruments and other securities, such as guarantees, insurance policies and bonds, considered as corporeal property, are simply pieces of paper. Their sole value is as choses in action. If, however, they are unlawfully converted, the person entitled may recover full damages to the extent of his loss ([citing, among others] *Alsager v. Close* [1842] 10 M & W 576; *Waston v. McLean* [1858] EB & E 75; *M'Leod v. M' Ghee* [1841] 2 M & G 326; *Klienwort v. Comptoir National d'Escompte* [1894] 2 QB 157).

[7] The action for conversion lay only at the suit of one who had possession of goods at the time the tort occurred or who had an immediate right to possess them (Clerk & Lindsell on *Torts* p. 634, entry 13-08). In the present case, the defence of the defendant is that the shares of the plaintiff (the subject-matter of the action) are held by them (the defendant) as collateral.

[8] Now, I shall proceed to narrate the facts. The plaintiff is a chartered accountant. A

[9] The defendant is a stockbroking company and is a member of the Kuala Lumpur Stock Exchange.

[10] On 21 February 1997 the plaintiff opened an individual share trading account with the defendant for the purpose of trading in shares at the KLSE. By the opening of this account, it meant that the plaintiff appointed the defendant to be his stockbroker to trade in shares on the KLSE. B

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[11] In order to open the account, the plaintiff had to complete and submit to the defendant an application form known as 'Application To Open An Account: Individual' ('the application form'). This was duly done by the plaintiff. The terms and conditions of the share trading account are as set out in the form; and para. 9 of the terms and conditions stipulates: D

> 9. K & N Kenanga Bhd. is authorised to sell at its absolute discretion all stocks and/or shares held by K & N Kenanga Bhd. under collateral and as well as in CDS account to settle my outstanding debit balance with K & N Kenanga Bhd. E

[12] It appears not to be disputed that the application form together with the terms and conditions serve as a contract between the plaintiff and the defendant.

[13] All the tradings transacted by the plaintiff through the defendant (the plaintiff's stockbroker) were actually done through a remisier, namely, one Carol Chew (DW3). Carol Chew works for the defendant as a remisier. In fact, when the plaintiff signed the application form, Carol Chew (DW3) signed the form as well - as a witness to the plaintiff's signature. F

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[14] On 27 and 28 February 1997 the plaintiff instructed the defendant (through DW3) to purchase 33,000 units of shares of a company known as Pancaran Ikrab Bhd ('PIB shares'). The total cost of the shares was RM487,545.

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[15] The plaintiff made full payment for the shares. The shares were deposited in the plaintiff's CDS account with the defendant. The abbreviation 'CDS' stands for 'Central Depository System'.

[16] In August 1998 all the PIB shares were sold in stages by the defendant as settlement of the plaintiff's debt with the defendant incurred by the plaintiff as a result of the accumulation of his contra losses and unpaid interests. I

[17] It is not disputed that the plaintiff was incurring contra losses and had not been paying interests that were due to the defendant, and was, therefore, indebted to the defendant.

[18] But the complaint of the plaintiff in this action is that the PIB shares were not collateral and as such the defendant had no right to forced sell them - even if the plaintiff was indebted to the defendant. He claims that he did not give any consent to the defendant to forced sell the PIB shares. He is, therefore, claiming damages for the wrongful sale in the sum of RM471,238.34. From the plaintiff's standpoint, by the (allegedly) wrongful sale, the defendant had committed the tort of conversion.

[19] Paragraph 8 of the plaintiff's statement of claim reads:

> 8. 33,000 saham syarikat Pancaran Ikrab tersebut tidak pada sebarang masa material dicagarkan kepada defendan sebagai kolateral bagi penyelesaian apa-apa baki terhutang dalam akaun individu plaintif di syarikat defendan.

[20] The defendant on the other hand contends that, by reason of para. 9 of the terms and conditions, they have the right to sell the PIB shares as the shares had been pledged by the plaintiff to the defendant as collateral and that the plaintiff had failed to settle his debt with the defendant.

[21] In dealing with this case, to my mind, the first pertinent issue that I must deal with is to determine the issue of burden of proof. Is it the plaintiff's legal burden, in the light of the nature of the relationship between the plaintiff and the defendant, and in the light of para. 8 above, to prove that the PIB shares were not held by the defendant as collateral? Or, is the legal burden on the defendant to prove that the PIB shares were held by the defendant as collateral?

[22] It is the contention of Encik Moghan, the learned counsel for the plaintiff, that the legal burden is on the defendant to prove that the PIB shares were collateral. The learned counsel for the defendant, Encik Inderjit Singh, on the other hand, submits otherwise.

[23] Now, s. 103 of the Evidence Act 1950 provides:

> 103. Burden of proof as to particular fact.
>
> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

[24] In my judgment, in the present case, based on the above s. 103 of the Evidence Act, in the light of the relationship of the parties, and in the light of para. 8 of the statement of claim, the legal burden is on the plaintiff to prove to the court that the PIB shares were not held by the defendant as collateral. By reason of para. 8 of the statement of claim, it is the plaintiff who wishes the court to believe in the existence of a particular fact - that particular fact being that the PIB shares were not held by the defendant as collateral.

[25] The evidence adduced by the plaintiff to prove that the PIB shares were not held by the defendant as collateral were:

(a) that he had never pledged his PIB shares to the defendant as collateral;

(b) that he has paid fully for those shares;

(c) that his account with the defendant was not in the nature of a margin account;

(d) that he had no credit facilities with the defendant; and

(e) that he did not authorise the defendant to hold the PIB shares in the CDS account.

[26] According to the plaintiff's evidence, the procedure to pledge shares are as follows:

> Q: What is the procedure to pledge shares as collateral?
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> A: I must apply for credit facilities or what is known as margin facilities from the Defendant. If approved, I will have to sign a separate share margin loan agreement for a collaterised individual trading account allowing and agreeing to pledge my shares in the CDS account to the Defendant as collateral. As stated earlier I did not apply for any such individual collaterised account with the Defendant. The Defendant also did not give me any credit facilities.

[27] In my judgment, the plaintiff has failed to prove on a balance of probabilities that the shares were not held by the defendant as collateral.

[28] I so hold for the following reasons.

[29] Firstly, it is undisputed that the plaintiff signed the application form which contains the terms and conditions, including para. 9, as mentioned above. Paragraph 9 deems shares held in the CDS account to be collaterals.

[30] Secondly, it is not disputed that the PIB shares were held in the CDS account.

[31] Thirdly, it appears not to be disputed that the application form is a contract between the plaintiff and the defendant.

[32] Fourthly, the plaintiff fails to explain clearly and adequately as to why the PIB shares were held by the defendant in his CDS account. The shares were purchased on 27 October 1997 and by 17 November 1997 they were fully paid. Yet those shares continued to remain in his CDS account with the defendant. Throughout the trial the plaintiff does not make it clear as to why the PIB shares were held in the CDS account. What could be gathered from the plaintiff's evidence is merely from the following evidence of the plaintiff during re-examination:

> Pemeriksaan Semula:
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> (A, page 1, referred to witness: Condition 9)
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> Q: Under this clause what is your understanding as to Kenanga's right to sell the shares?
>
> A: The simple rule of this share trading is that when you purchase any shares, within the period of seven trading days, you either pay for the shares or Kenanga have the right to sell your shares, after the seven trading days. Or, you can pay the shares in full within the seven trading days. If you pay for the shares, the shares would be deposited in your CDS account; and if you do not pay for your shares, within the seven trading day period, Kenanga has the absolute right to force sell your shares after the seven trading days.
>
> Q: If you have paid for the shares in full within the seven days, has the defendant the right to sell off the shares?
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> A: No.
>
> (Questioned by Judge:
>
> You said if the shares are paid in full, the shares would be deposited in your CDS account. What is a CDS account; and why must fully paid shares be put in this CDS account?
>
> A: In those days the account was called Malaysia Central Depository Account. In short it was called 'MACDS'. The company that manages your shares is just like a bank. The only person who has access to the account is non other than the legal owner of the shares. The purchaser is the legal owner.

Question by Judge:

Is the legal owner/purchaser free to sell off those shares?

A: Yes.

Question by Judge:

Can the company that manages the shares sell the shares?

A: No.)

Pemeriksaan Semula (sambung):

Q: Is it compulsory that the shares must be deposited in the CDS account?

A: Yes.

(Question by Judge:

What makes it compulsory? Is it compulsory by reason of any law or by reason of KLSE regulations? Or is it compulsory by reason of a contract between the purchaser and the stockbroking company?

A: By KLSE regulations.)

[33] Thus the question that I posed remains unanswered. It is not good enough for the plaintiff just to assert that the PIB shares were compulsorily required to be deposited in the CDS account 'By KLSE regulations' without specifying and explaining the particular regulation. The plaintiff must also explain how the defendant, not being the owner of the PIB shares, and that the PIB shares were (allegedly) not held by the defendant as collateral, yet was 'in a position' to sell those shares to a third party without the plaintiff's authorization. How was the third party able to buy the shares if the shares were not pledged to the defendant and there was no authorization to sell by the plaintiff? What was the 'mechanism' involved in the sale? Has it got something to do with the fact that the shares were in the CDS account?

[34] Fifthly, there have been a series of letters exchanged between the defendant and the plaintiff. By the defendant's several letters (letter dated 24 December 1997; letter dated 12 January 1998; letter dated 20 January 1998; letter dated 26 January 1998; letter dated 23 February 1998; letter dated 27 April 1998; letter dated 25 May 1998; letter dated 7 July 1998; letter dated 3 August 1998; letter dated 12 August 1998; and letter dated 25 August 1998) the defendant reminded the plaintiff that he was indebted to the defendant by reason of his contra losses and unpaid interests; and

A that the plaintiff had failed to settle the debt despite numerous reminders; and the defendant warned the plaintiff that should he still fail to settle his debt then all the shares held as collaterals (including the PIB shares) would be sold and the proceeds be used towards settlement of the debt.

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[35] By the plaintiff's several letters (letter dated 8 January 1998; letter dated 22 January 1998; letter dated 20 February 1998; letter dated 17 April 1998; letter dated 5 May 1998; letter dated 26 May 1998; letter dated 17 July 1998; letter dated 30 July 1998; and letter dated 12 August 1998) the plaintiff acknowledged his contra losses C and his debt to the defendant; the plaintiff acknowledged that the PIB shares were collateral; the plaintiff requested for more time to settle his debt; and the plaintiff pleaded with the defendant not to sell the PIB shares.

D **[36]** In his several letters to the defendant, not once did the plaintiff assert that the PIB shares were not collateral. On the contrary the exchanges of letters go to show that both parties regarded the PIB shares as being collateral.

[37] A glaring example of an admission by the plaintiff that the E PIB shares were held by the defendant as collateral is the plaintiff's letter of 8 January 1998 to the defendant which reads (I shall set out only the relevant portion of the letter):

> I refer to your letter of 24th December 1997 which was sent by your F company and have demanded from me to pay the total outstanding due within seven days from the date hereof. If I fail to settle your company will sell my shares held as collateral to set off the margin outstanding contra losses. As you are fully aware that I do not have any margin account and I have not borrowed a single cent from your company to pick up my shares. The shares owned by me are Pancaran Ikrab G Berhad, Sime Darby Berhad and AMMB. These shares are bought at a very high price with my own cash and at this present moment the price is very low especially Pancaran shares which is only at RM1.00.

[38] I accept the submission of the learned counsel for the defendant, Encik Inderjit Singh, that the plaintiff is estopped from H denying the admissions that he had made in his various letters to the defendant - the admissions that the PIB shares were collateral.

[39] The plaintiff's admissions are admissible by reason of s. 21 of the Evidence Act 1950. Section 21 provides:

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> Proof of admissions against persons making them and by or on their behalf.

21. Admissions are relevant and may be proved as against the person who makes them or his representative in interest; ... A

[40] It is, however, true that the admissions as evinced by the plaintiff's letters are not conclusive proof of the matter admitted. Nevertheless, the admissions operate as an estoppel by virtue of ss. 31 and 115 of the Evidence Act. Section 31 provides: B

Admissions not conclusive proof but may estop.

31. Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained. C

[41] And section 115 provides:

Estoppel.

115. When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, otherwise than but for that belief he would have acted, neither he nor his representative in interest shall be allowed in any suit or proceeding between himself and that person or his representative in interest to deny the truth of that thing. D E

[42] The above codification of the principle of estoppel, like most other principles of the law of evidence contained in our Evidence Act, has its origin in the common law. The traditional classification of legal estoppels are set out by the great judge and jurist Coke C. J in his work two Coke on Littleton, 352(a) and they fell into one of only three classes: first, estoppels by record; secondly, estoppels by deed; and, thirdly, estoppels in pais (see Phipson on *Evidence* 17th edn, at p. 112, entry 5-07). The principle of estoppel as set out in s. 115 above is known at common law as estoppels in pais. Originally the principle of estoppels in pais were of limited application; but the application of the principle was gradually extended to apply in almost any situation in which, because of a party's previous behaviour, it would be unconscionable to permit him to deny a fact (Phipson on *Evidence*, p. 118, entry 5-18). The rule in its modern form has been authoritatively stated in *Pickard v. Sears* [1837] 6 A, & E 469 at 474 as follows: F G H

Where one by his words or conduct wilfully causes to believe the existence of a certain state of things and induces him to act on that behalf so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time. I

[43] Applying the above principle of estoppel, the plaintiff having admitted in his letters to the defendant that the PIB shares were collateral, is now precluded from denying that the PIB shares were collateral.

[44] Sixthly, there are the two undated letters, namely, exhs. P1 and P2, written by the plaintiff to the defendant and received by the defendant on 9 October 1997. In the letter at exh. P1 the plaintiff authorised the defendant to use all his (the plaintiff's) shares deposited in his CDS account as collaterals against any outstanding debit balances due to the defendant. In the letter at exh. P2, the plaintiff agreed to transfer the CDS shares held in his CDS account to a nominee of the defendant, namely, Kenanga Nominees (Tempatan) Sdn Bhd as Short-Term collaterals for his trading account; and that if the plaintiff did not settle his debts within 30 days, the defendant has the right to sell the collaterals.

[45] These two letters were signed by the plaintiff before the defendant's remisier, Carol Chew (DW3). The plaintiff signed the two letters while he was in his car. He signed them on the steering wheel of the car. It is, however, not clear when these two letters were signed but there is evidence that they were received by the defendant on 9 October 1997.

[46] Seventhly, there is the evidence of the plaintiff's own solicitors' (Messrs Ariffin & Thava) letter dated 1 September 1998 to the defendant where again there is an admission that the PIB shares were held by the defendant as collateral. The second paragraph of the letter reads:

> Our client has informed us that he had purchased 33 Lots of Pancaran Ikrab Bhd. shares through your company sometime towards the later part of 1997. However due to the downturn of the stock market obtaining then our client incurred certain contra losses. Upon the incurrence of the said losses instead of you disposing the shares during the normal settlement period our client was expressly informed by you and/or your servants and/agents that as long as our client settled the losses you would not force sell our client's shares lodged with you as collateral.

[47] This is an admission by an agent. As the solicitors for the plaintiff, Messrs Ariffin & Thava were the agent of the plaintiff. Section 18 of the Evidence Act provides:

18. Admission by party to proceeding, his agent or person interested.

(1) Statements made by a party to the proceeding or by an agent to any such party whom the court regards under the circumstances of the case as expressly or impliedly authorized by him to make them are admissions.

[48] By reason of the above provision, the admission (that the PIB shares were held by the defendant as collateral) by Messrs Ariffin & Thava was as good as an admission by the plaintiff himself, the principal. Based on the circumstances of the case, I regard the admission by Messrs Ariffin & Thava in their letter as having been duly authorized by the plaintiff himself. This must be the inference to be made from the facts of the case. This is because, after the plaintiff's solicitors' letter was issued, if indeed it was true that the statement in the solicitors' letter, to the effect that the PIB shares were collateral, was a mistake or incorrect, then the plaintiff ought to have asked his solicitors to issue a follow-up letter to the defendant to point out that the admission was a mistake in that the PIB shares were not collateral. But this was never done. And when I asked the plaintiff as to why he never asked his solicitors to make the correction, he was not able to give a satisfactory answer. Likewise here, this admission by the plaintiff's solicitors is relevant and admissible by reason of s. 21 of the Evidence Act; and, likewise, the principle of estoppel applies by reason of ss. 31 and 115 of the Evidence Act.

[49] Finally, if as contended by the plaintiff that he was the owner of the PIB shares and that the selling of those shares by the defendant was (allegedly) unlawful, then why was there no police report made by the plaintiff against the defendant for the theft (or criminal breach of trust, as the case may be) of those shares by the defendant? Or, alternatively, why was there no complaint made by the plaintiff to the KLSE against the defendant in respect of the allegedly unlawful sale?

[50] It is the contention of the plaintiff that the two letters (exhs. P1 and P2) allegedly signed by him in his car at the steering wheel before DW3 were forgeries. But it is my finding that they were not forgeries. My finding that they were not forgeries are based on the following reasons.

[51] Firstly, there is the evidence of DW3 that she saw the plaintiff signing the two letters on the steering wheel. In her evidence she said:

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> I went down to the ground floor to get him to sign the 2 letters dated 9/10/1997, while the plaintiff was in the car. The Plaintiff signed them - while he put the two letters on the steering wheel.

[52] She did not say, however, in her evidence when this incident took place. But each of the letter bears the defendant's stamp
B stating the date of receipt of the two letters, that is, 9 October 1997. DW3 had been cross-examined by the learned counsel for the plaintiff. Her credibility remains unshaken. I find her being a truthful witness.

C **[53]** Secondly, there is the evidence of the defendant's expert witness, Encik Harcharan Singh (DW1), a consultant in forensic, who has analysed the signatures on exhs. P1 and P2, and he confirms that the signatures are not forgeries but were that of the plaintiff. I am inclined to accept his detail report testimony.

D **[54]** It is, however, true that the plaintiff too has called an expert witness, Encik Wong Kong Yong (PW2), a document examiner from the Chemistry Department of Malaysia. But, having analysed the evidence of both experts, I prefer the expert opinion of DW1. In my judgment the report of PW2 is sketchy: it is merely a one
E page report. In his one-page report, PW2, after describing the exhibits that he received (that is to say, the questioned signatures and the specimen signatures), abruptly gives his conclusion, which is as follows:

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> On comparison, I found the questioned signatures 'Q1' and 'Q2' to differ in handwriting characteristics from the specimen signatures. Hence, I am of the opinion that these questioned signatures 'Q1' and 'Q2' were not written by 'Cheong Cheng Onn', the person who wrote the specimen signatures.

G **[55]** There is no analysis. There is no explanation as to how PW2 arrived at the above conclusion. Moreover, PW2, unlike DW1, had not used proper equipments for his analysis. No blown-up photographs of the questioned signatures were taken.

[56] The report of DW1, on the other hand, is very detail and
H analytical, with photographs of the questioned signatures blown up using proper equipments, including a stereoscopic binocular zoom microscope.

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[57] In any event, as a matter of law, in the light of the evidence of DW3 (whose evidence I find trustworthy), there is really no necessity for the court to rely on expert evidence in order to make a finding as to whether or not forgery had been committed. In Sarkar's *Law of Evidence* 15th edn, vol 1, it is said (at p. 917):

> Where there is direct and trustworthy evidence of persons who saw the testator sign, it is not necessary to rely on expert evidence (*Kameswara v. Suryaprakasa*, A 1962 AP 178).

[58] Thirdly, to allege forgery is to make a serious allegation. Forgery is a serious crime under the Penal Code. Yet the plaintiff did not see it fit to make a police report against DW3, if he genuinely believes that a forgery had taken place.

[59] Now back to the issue of the burden of proof, even assuming for a moment that I am wrong in holding that the legal burden is on the plaintiff to prove that the PIB shares were not collateral, and that the correct position in law is that the legal burden is on the defendant to prove that the PIB shares were collateral, I am of the view that based on the totality of the evidence adduced, the defendant has succeeded in proving on a balance of probabilities that the PIB shares were collateral.

[60] Apart from the evidence as set out above in this judgment, there is also the evidence of the defendant's witness one Ms Madeline Gan May Lee (DW2), the Chief Financial Officer of the defendant company, who said that as the PIB shares were CDS shares (meaning that they were held in the plaintiff's CDS account with the defendant), therefore, they were held as collateral, and that the basis for holding those shares as collateral is para. 9 of the application form referred to earlier. She said, in the light of para. 9, strictly the defendant need not have to rely on the two letters at exhs. P1 and P2 in order for them to sell the PIB shares as collateral.

[61] In my judgment, putting the issue of admission and estoppel aside, it is clear from para. 9 of the terms and conditions of the application form, in particular, the words '... under collateral as well as in CDS account ...' that CDS shares are collaterals. It is not disputed that the PIB shares were held by the defendant in the plaintiff's CDS account. Plaintiff's claim is dismissed with costs.